

YAP YOKE LUAN & ORS.

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v.

ONG WEE TOK & ORS.

FEDERAL COURT, KUALA LUMPUR

SALLEH ABAS CJ (MALAYA)

GEORGE SEAH FJ

SYED AGIL BARAKBAH FJ

[CIVIL APPEAL NO. 284 OF 1982]

19 OCTOBER 1983

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CONTRACT: *Agreement by administrators for sale of land - Administrators to apply to High Court for leave to sell - Dismissal of application for leave - Consideration for land - Whether reasonable - Delay - Effect - Equitable estoppel - Whether applicable.*

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SUCCESSION: *Administrators - Duty to exercise due prudence.*

The 1st and 2nd respondents, as administrators of one Ong Sing Keng, who died intestate, executed a written agreement in March 1973 for the sale of two adjoining lots of the estate of the deceased to the appellants. The sale was subject to Court approval, the administrators to apply within 180 days for leave to sell and transfer the land to the appellants. The appellants were allowed vacant possession of the land. They cleared the land and lodged a caveat. On the administrators failing to apply for leave, the appellants filed a suit in 1975 and in December 1981, obtained an order from the High Court, ordering the administrators to apply for leave. The administrators applied, citing the beneficiaries (the third to the fourteenth respondents) as the respondents. The appellants were added as interveners. The beneficiaries opposed the application on the grounds that they had not been consulted, nor their consent obtained prior to the purported sale and that the price was grossly below its fair market price in 1973, as evidenced by the valuation report filed by them. The application was dismissed. The appellants appealed.

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Held:

[1] The administrators had failed to carry out their duty as trustees to obtain the best possible price. They had not exercised due prudence in the interests of the estate by executing the contract for such low consideration without consulting and obtaining the consent of the beneficiaries. The Court was concerned that the price was a reasonable one not at the time the offer was made but at the time of hearing the application for approval of the proposed sale. (*Gan Hong Hoe v. Aziz Beg* [1954] 20 MLJ 202, distinguished; *Che Ah & Che Yang Kelsom v. Che Ahmad* [1941] MLJ Rep. 105; *Buttle v. Saunders* 2 Ch D 193, 195; *Tunku Ismail bin Tunku Mohamed Jawa & Anor. v. Tunku Baharom bin Tunku Mohamed Jawa & Ors.* [1982] 2 MLJ 44, 45).

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[2] The appellants too were responsible for the inordinate delay and had themselves to blame for it. There was no reasonable excuse for their long delay in seeking relief under O. 80 Rules of the High Court.

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[3] The doctrine of equitable estoppel as proposed in *Amalgamated Investment & Property Co. Ltd. (in liquidation) v. Texas Commerce International Bank Ltd.* [1981] 1 All ER 923, did not apply. It was well within the knowledge of the appellants that the sale was subject to the approval of the Court, as expressly provided by the agreement.

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- a** [4] The appellants' counter-offer to purchase the land at a sum slightly above the price quoted in the valuation report in 1973 was unreasonable and unfavourable to the estate as a whole, as the value of the land had increased considerably since 1973.

[Appeal dismissed.]

Cases referred to:

- b** *Che Ah & Che Yang Kelsom v. Che Ahmad* [1941] MLJ Rep 105
Tunku Ismail bin Tunku Mohamed Jewa & Anor. v. Tunku Baharom bin Tunku Mohamed Jewa & Ors. [1982] 2 MLJ 44
Gan Hong Hoe v. Aziz Beg [1954] 20 MLJ 202
Amalgamated Investment & Property Co. Ltd., (in liquidation) v. Texas Commerce International Bank Ltd. [1981] 1 All ER 923

c **Legislation referred to:**

Rules of the High Court 1980, O. 80

For the applicants/interveners - K.L. Ananthan

For the 1st & 2nd respondents - K.C. Loke

For the 4th, 5th & 6th respondents - K.L. Chong

For the 3rd, 8th, 9th, 11th & 12th respondents - M.C. Choong

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JUDGMENT

Syed Agil Barakbah FJ:

- e** This case involves the purchase of land belonging to the estate of Ong Sing Keng who died intestate (hereinafter called "the deceased"). The first and second respondents are the administrators having been granted Letters of Administration on 23 November 1946 and extracted on 9 July 1947 *vide* petition No. 105 of 1946. The twelve beneficiaries to the estate are the third to the fourteenth respondents. The estate comprises of two adjoining lots totalling slightly over 122 acres of which about 40 acres are under rubber and the rest being vacant land. It was registered in the name of the deceased under Pahang Certificates of Title Nos. 348 and 349 for lots Nos. 842 and 843 both situated in the Mukim of Triang (hereinafter referred to as "the said land").
- f** On 15 March 1973 the administrators executed a written agreement for the sale of the said land with the appellants who agreed to purchase it free from all encumbrances subject to Court approval as specified in Clause 2 of the agreement. Under Clause 3 the administrators in their capacity as the vendors undertook to apply to the relevant High Court for leave to sell and transfer the said land to the appellants not later than 180 days from the date of the execution of the agreement. On the execution of the agreement the appellants paid the sum of RM45,000 by way of deposit and the receipt thereof
- g** was acknowledged by the administrators. It was also agreed *vide* Clause 6 that in the event that leave of Court was not obtained the administrators would refund the said deposit.

- There was no dispute that the administrators failed to apply for leave as undertaken by them in Clause 2. The reason as stated in their affidavit dated 8 December 1981 (p. 8 of the Appeal Record) was because they could not obtain the consent from all the beneficiaries and prior
- h** to and at the time of signing the agreement they had only consulted and obtained the consent of only four of the beneficiaries. Subsequently three of them withdrew thus leaving only one who consented. As a result of their inaction the appellants filed Civil Suit No. 847 of 1975 against the administrators and on 4 December 1981 obtained an order from the High Court, Kuala Lumpur ordering the administrators to apply to the relevant High Court for leave to sell and transfer the said land within 14 days from the date of the order failing which the
- i** appellants were empowered to apply on their behalf. In compliance with the said order the

administrators filed Originating Summons No. 135 of 1981 in the High Court Seremban on 10 December 1981. The beneficiaries were cited as the respondents. Subsequently the appellants on 1 March 1982 successfully applied to be added as the interveners in the originating summons. The summons was heard by the learned Judge who dismissed the application with costs. The appellants being dissatisfied with the said decision have now appealed to this Court.

It should be noted that even though the agreement was conditional upon leave of Court being obtained the respondents were allowed vacant possession of the said land on the execution of the agreement (Clause 13). They cleared the land for the purpose of housing development and also lodged a caveat. They were also responsible for the payment of quit rents for the year 1973 *vide* Clause 7 and continued to pay the same for the following years as they remained in occupation of the said land. The appellants claimed to have expended RM7,615.40 in the payments of quit rents and assessments up to the year 1981. They conceded however of having the rubber tapped and earning some income but had to stop on finding it was uneconomical due to the trees being old. No mention was made as to the period that the rubber was tapped and as to the income derived therefrom.

The beneficiaries on the other hand filed affidavits opposing the application for leave to sell the said land to the appellants pursuant to the said agreement. The main grounds are firstly, that none of them were consulted nor their consent obtained prior to the purported sale. Secondly, the purchase price of RM150,000 as agreed upon between the appellants and the administrators was grossly below its fair market value at the material time. In support thereof they filed a valuation report dated 20 November 1981, prepared by M/s C.H. Williams, Talhar & Wong Sdn. Bhd. showing as at March 1973, that is, at the time the purported sale agreement was executed, the value of the said land was RM244,000. The appellants did not challenge the valuation price but submitted through Counsel that the valuation report contains comparison of sales of fairly small areas of adjacent lands worth about RM40,000 each. They had paid a much higher price for the said land including a deposit of 30% of the purchase price well in March 1973. They had incurred expenses in clearing the land and in paying the quit rents and assessments and therefore it was unconscionable for the beneficiaries to oppose the application.

In this regard we are of the view that the appellants as the proposed purchasers under a conditional contract were perfectly well aware that their contract had to be approved by the Court before it could be carried into effect and they had taken the risk of losing their bargain if the Court refused to grant such approval. The duty of the Court is to protect the rights of the beneficiaries and not to consider the interest of the proposed purchasers. In exercising its discretion the Court will have to look into the facts and surrounding circumstances of the case i.e. whether the proposed sale was favourable to the beneficiaries and whether the administrators had acted with proper prudence in exercising their overriding duty to obtain the best possible price. The Court is concerned that the price is a reasonable one not at the time the offer was made but at the time of hearing the application for approval of the proposed sale. (*Che Ah & Che Yang Kelsom v. Che Ahmad* [1941] MLJ Rep 105 and *Buttle v. Saunders* 2 Ch D 193, 195 and *Tunku Ismail bin Tunku Mohamed Jawa & Anor. v. Tunku Baharom bin Tunku Mohamed Jawa & Ors.* [1982] 2 MLJ 44, 45). We agree with respect with the learned Judge that the purchase consideration of RM150,000 was manifestly low in the light of the valuation of the market value of RM244,000 for the said land at the material time. It was apparent that the administrators had failed to carry out their duty as trustees to obtain the best possible price. Since most of the beneficiaries had not been consulted nor their consent been obtained, the administrators should have applied the

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- a* common-sense rule of calling for a valuation report. That would have assisted them in considering whether the purchase consideration they had agreed upon was reasonable as the best possible price. No doubt there was no higher offer at the material time but in our opinion, they have not exercised due prudence in the interests of the estate by executing the contract for such a low consideration without consulting and obtaining the consent of the beneficiaries. Apart from that they went further in allowing the appellants to take
- b* possession of the said land, reap the benefit from the sales of rubber and clear the land for the purpose of a housing project. The fact that the appellants have paid 30% deposit and incurred expenses while in occupation of the said land may be a matter for consideration by the Court but that cannot and does not override the duty of the Court to see that the estate benefits as much as possible. The *ratio decendi* in *Gan Hong Hoe v. Aziz Beg* [1954] 20 MLJ 202 has no application and is easily distinguished. In that case there was no question
- c* whether the purchase consideration was unreasonable and the beneficiaries did not oppose the conditional sale. The purchaser having occupied the land and the house thereon was held not to be entitled to specific performance of the contract but was awarded damages for breach of contract. The well-accepted principle in *Che Ah & Che Yang Kelsom's* case did not appear to have been cited. We feel that had that been brought to the attention of the learned Judge, his decision would have been different.

- d* The next important issue relates to the delay by the administrators to apply for leave of the Court during the period as specified in Clause 2. There appears to be a delay of about seven years until the date of the proceeding. About two years after the execution of the agreement the appellants filed Civil Suit No. 847 of 1975 against the respondents but waited more than five years to obtain a Court Order requiring the administrators to apply for leave to sell the said land. No doubt the administrators had failed to act under Clause 2 on the
- e* mistaken ground as stated earlier. However there was no reasonable excuse for the appellants to have been inactive for such a long period without seeking relief under O. 80 RHC much earlier. It would seem that they were content to lie low without taking any step what ever in the belief that their occupation of the land and payment of deposit and other expenses, would strengthen their position as purchasers. Little did they realise that according
- f* to prevailing current events land values have rocketted sky high since the execution of the agreement. Faced with strong opposition from almost all the beneficiaries right from the beginning and the inaction of the administrators to comply with Clause 2 of the agreement, they failed to comprehend that their task in convincing the Court that the purchase consideration of RM150,000 was favourable to the beneficiaries was rendered difficult.

- g* We do not agree with the submission that the agreement has already lapsed in view of the proviso in Clause 2 which reads:

... PROVIDED THAT should the said Order approving the sale and transfer of the said lands be delayed, this Agreement shall still be in force.

- h* We read the order as referring to delay by the Court in approving the sale and transfer and not delay by any of the parties to the agreement. However in the absence of arguments on the legality or otherwise of the proviso, we feel justified in concluding as the learned Judge has done, that the appellants are also responsible for the inordinate delay and have themselves to blame for it.

- i* Further, the doctrine of equitable estoppel as propounded in *Amalgamated Investment & Property Co. Ltd., (in liquidation) v. Texas Commerce International Bank Ltd.* [1981] 1 All ER 923 does not apply. This is not a case where the administrators had stood by and allowed

the appellants to incur expenditure in clearing the said land and paying quit rents and assessments or otherwise to act in the mistaken belief as to their rights over the said land, in view of the fact that it was well within their knowledge that the sale was subject to the approval of the Court as expressly provided in Clause 1 of the agreement. Nor can it be said that the appellants had been influenced by any representation or encouragement on the part of the administrators into taking possession of the land and incurring such expenditure.

The appellants have now made a counter-offer by increasing the purchase consideration to RM250,000, a sum slightly above the price quoted in the valuation report in 1973. Since then according to the submission of the learned Counsel for the respondents, the price of the said land has increased tremendously to about RM3,000,000 and the beneficiaries are prepared to purchase the said land at a reasonable price. No doubt there was no proper valuation of the land at the date of the application and the beneficiaries had not made any quotation of their offer. Be that as it may, there is no reason to doubt that the value of the said land is very much more than that in 1973. The appellants' counter-offer is thereby rendered unreasonable and unfavourable to the estate as a whole.

For the reasons stated above we dismiss the appeal. There is to be no order as to costs.

Also found at [1983] 2 CLJ 252

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